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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re CHLOE N. et al., Persons Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. MICHELLE D., Defendant and Respondent; CHLOE N. et al., Objectors and Appellants.	G041718 (Super. Ct. Nos. DP017797 & DP017798) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Douglas Hatchimonji, Judge. Affirmed. Motion to strike letter brief. Denied.

Marsha F. Levine, under appointment by the Court of Appeal, for Objectors and Appellants.

Nicholas S. Chrisos, County Counsel, and Karen L. Christensen, Deputy County Counsel, for Plaintiff and Respondent.

Niccol Kording, under appointment by the Court of Appeal, for Defendant and Respondent.

* * *

I.

INTRODUCTION

Chloe N. (born in March 2006) and Christian D.-N. (born in July 2008) appeal from a dispositional order granting their mother, Michelle D. (Mother), reunification services pursuant to Welfare and Institutions Code section 361.5, subdivision (a) (all further code references are to the Welfare and Institutions Code). Chloe and Christian argue the evidence was insufficient to support the juvenile court's findings that clear and convincing evidence did not establish Mother came within the exceptions to providing reunification services set forth in subdivision (b)(10), (11), and (13) of section 361.5. We conclude the evidence at the dispositional hearing was sufficient to support the order granting reunification services and therefore affirm.

We recognize this is a close case and emphasize we reach our conclusion because of the applicable standard of review as applied to the juvenile court's specific findings on the record. That standard of review requires us to defer to the juvenile court's assessment of witness credibility and to accept the juvenile court's reasonable inferences drawn from the evidence. As we are affirming the dispositional order, custody of Chloe and Christian remains vested with the Orange County Social Services Agency (SSA) for suitable placement.

At the outset, we address Chloe and Christian's motion to strike SSA's letter brief dated May 22, 2009. SSA initially recommended that the juvenile court deny Mother reunification services. After the order granting reunification services had been appealed, SSA submitted its May 22 letter brief, which stated, "after careful

consideration of the facts of the case as they now exist and in the best interests of the children, SSA cannot concede error as outlined by the Minors in their opening brief and currently believes that reunification services should be continued." Chloe and Christian have moved to strike SSA's letter brief, arguing it impermissibly addresses circumstances arising after the order being challenged. We deny the motion to strike, but construe SSA's letter brief only as a statement of its position on appeal. We decline to consider any mention in the letter brief of facts or circumstances occurring after the dispositional order granting reunification services.

II.

FACTS AND PROCEEDINGS IN THE JUVENILE COURT

A. *The Juvenile Dependency Petition and Events Leading to the Dispositional Hearing*

Chloe and Christian were taken into protective custody on November 4, 2008. Mother had left Chloe and Christian in a motel room with a man she had met the prior day, and then failed to return. Mother had not left a telephone number where she could be reached, and there were no food, diapers, or clothes for the children in the motel room.

The juvenile dependency petition, filed November 6, 2008, alleged failure to protect (§ 300, subd. (b)), no provision for support (§ 300, subd. (g)), and abuse of sibling (§ 300, subd. (j)). The petition alleged, "mother suffers from bi-polar disorder with mood disorder and has difficulty taking her medication as prescribed" and "mother has a chronic personal and criminal history of illegal drug use and that unresolved substance abuse problem has impaired her ability to provide the minors with regular care, protection, and support."

Mother has had four children previously taken into custody and declared dependent children of the juvenile court. Jacob T. (born in March 1993) was declared a dependent child in 1993 or 1994. Mother was offered reunification services from

November 1993 to July 1995. The dependency case terminated in 1996 and Jacob was adopted. J.A. (born in September 1994) and M.D. (born in December 1995) were declared dependent children in September 1998. Mother was not offered reunification services for M.D., and her parental rights were terminated in 2001. The dependency case as to J.A. terminated in 1999 and physical custody was awarded to his father. Quentin D. (born in November 1999) was declared a dependent child in January 2002. Mother was offered reunification services, which were terminated in May 2003. Mother's parental rights to Quentin were terminated in December 2003, and he was subsequently adopted.

A detention hearing in this matter was held on November 7, 2008. Chloe's father, Joshua N., was present, but Mother's whereabouts were unknown. The identity of Christian's father was unknown. At the hearing, the juvenile court ordered Chloe and Christian detained and offered Mother monitored visits when she came forward to SSA and to the court.

Chloe and Christian, initially placed in Orangewood Children's Home, eventually were placed in foster care, where they remained until the dispositional hearing.

In the jurisdiction/disposition report, SSA recommended that reunification services not be provided to Mother and that reunification services be offered to Joshua N. if he were found to be Chloe's presumed father. The reported recited Mother's extensive criminal background dating from 1988 and her history with the juvenile dependency system. Mother's probation officer reported that Mother had failed to appear for scheduled appointments, and the officer was in the process of preparing a warrant for her arrest.

The jurisdictional hearing was held on November 25, 2008. Mother did not appear, and the juvenile court entered her default. The court found the allegations of the petition (as amended by interlineation) true by a preponderance of the evidence.

On January 27, 2009, a social worker visited Mother after learning she was incarcerated in the Orange County jail. Mother told the social worker she had been

arrested at the end of November 2008. Mother had not contacted the social worker because she was bipolar, had suffered a nervous breakdown, and was too sad to get out of bed after Chloe and Christian were removed from her custody. Mother denied abandoning Chloe and Christian. Mother told the social worker she had left the motel room to buy diapers and, when she returned, the children were gone.

In an addendum report dated February 3, 2009, SSA recommended that Mother be given reunification services. But in another addendum report with the same date, SSA recommended that Mother be denied reunification services.

Mother appeared in court for the first time at the dispositional hearing on February 3, 2009. Mother identified Christian's father as "Jose." She did not know Jose's last name or his whereabouts. The juvenile court ordered monitored visitation for Mother, and, because counsel had just been appointed for her, continued the hearing to February 24, 2009.

In a February 24, 2009 addendum report, SSA again recommended denying Mother reunification services. The report noted that Mother had provided SSA with an appointment card confirming her enrollment in a perinatal program.

B. *The Dispositional Hearing*

A contested dispositional hearing commenced on February 24, 2009. Mother and social worker Liquita Hudson testified. The court received in evidence the SSA reports dated November 25, 2008, January 12, 2009, February 24, 2009, and two SSA reports dated February 3, 2009.

Mother testified she had not used methamphetamine since November 15, 2008, after Chloe and Christian had been removed from her custody. Before then, she had been using one-quarter or one-half gram of methamphetamine each day, "off and on," for 15 to 20 years. Mother believed Chloe and Christian had not been removed because of her drug use, but because she had left them in a motel room for "four hours."

Mother had registered for a perinatal class. She had been drug testing since her release from jail on January 30, 2009, and since then had no missed, positive, or diluted tests. Mother had been attending Alcoholics Anonymous (AA) meetings daily and working with an AA sponsor since February 1.

Mother acknowledged having four children previously detained as a result of her substance abuse issues. She could not recall whether the case plans required her to participate in substance abuse programs.

Mother testified she entered a substance abuse program in 2000 and remained sober for five years.[1] In 2005, she relapsed for two months, then regained sobriety and attended AA meetings. She relapsed about one year later, in 2006. Mother was arrested and jailed. She was released from jail sometime in 2007. Mother had been jailed twice since then, and started using methamphetamine on November 4, 2008, when Chloe and Christian were detained.

Mother testified she suffers from bipolar schizoaffective disorder and had taken medications for that condition for 15 years. When Mother relapsed, she had not taken her medication. She had not taken her medication when Chloe and Christian were detained because her medication was in a hotel room that had been locked because she could not pay the bill. At the time of the hearing, Mother was taking her medication and was regularly seeing a physician.

Mother believed she would not relapse again, stating: "I've come to terms with the fact that no matter what, I have to stay on my medication. My medication has a big weigh-in on my mental state and stability and my desire to self-medicate when I'm

[1] Mother later was reminded that Quentin had been detained in 2002 based on Mother's drug abuse. Mother then testified she graduated from the sober living program in 2002 and relapsed in 2007. Mother ultimately testified she was "really confused" about the dates of her sobriety and relapse.

not on my medication. I have to make that a priority. Before anything, I have to make sure I have my medication."

Mother did not know whether she was on medication when Jacob was detained. When J.A., M.D., and Quentin were detained, Mother was in a process of "trial and error" in finding the right medication. She believed she had at last found a physician "who really took the time to get me the correct medication." When on that medication, she was "functional." Mother had an arrangement with her physician to receive three months' worth of medication at a time.

Three days before the start of the dispositional hearing, Mother had moved into a sober living home. The home required Mother to attend AA meetings daily, perform chores, participate in random drug testing, take her medication, and abide by the rules of the house.

Mother was unemployed and received supplemental security income. Mother testified she would like to move into an apartment and start working again. She quit her last job because she had relapsed.

Mother denied the allegation in the petition that she smoked methamphetamine in the motel room on November 3, 2008. She claimed she had not been using drugs on the day Chloe and Christian were detained, and believed drug use had nothing to do with their detention. Mother believed she had made a bad decision in leaving Chloe and Christian with a friend.

At the time of the dispositional hearing, Mother was authorized two-hour monitored visits with Chloe and Christian. Mother never missed a visit and was never late. She described Chloe and Christian as affectionate—"[h]ugs and kisses always." According to Mother, at the end of one visit, Chloe became sad and tried to follow Mother as she left.

Mother was asked what had changed since her four other children had been detained. She answered: "[F]or me the issue with the medication and the priority that's

going to need to take precedence in my life is going to be first things first. And that's going to be number one. [¶] Number two, I'm back on track in may program again. I'm working the steps. I have a sponsor. And the combination of those two things, I feel like I'll be okay. Only God will tell. I'm just going to try my best."

Hudson testified that she first had contact with Mother on January 26, 2009. When Hudson asked Mother whether she had participated in substance abuse services, she mentioned only the sober living program she entered in 2000 or 2002. Hudson had reviewed a case plan from August 2001 for Quentin, and it required her to participate in substance abuse treatment and testing, a 12-step program, a parenting course, and counseling.

Hudson testified her recommendation was not to provide Mother with reunification services. Hudson did not believe services would be beneficial because Mother had not benefitted from prior services.

C. *The Juvenile Court's Order Granting Reunification Services*

The juvenile court ordered reunification services be offered to Mother. The court found the elements of section 361.5, subdivision (b)(10), (11), and (13) had not been proven by clear and convincing evidence.

The court found Mother to be "a generally credible witness" and "as honest as she could be given her admitted 15-year drug history." The court acknowledged that Mother was confused about the dates of her five-year period of sobriety, but did not believe she was being deliberately dishonest. The court considered Mother's visits with Chloe and Christian, their apparent "good relationship" with Mother, and the fact they had not been detained previously.

The juvenile court found it had not been shown by clear and convincing evidence that Mother had been resistant to drug treatment over the past three years. After considering Mother's relapse history, the court stated: "This court believes th[at] drug

rehabilitation is a personal war fought by the addict with battles both won and lost. Relapse is a recognized part of rehabilitation and recovery." The court explained the testimony of Mother's history of sobriety and relapse could be viewed as resistance to drug treatment, or as a pattern of conduct "typical of an addict still in the midst of the war for recovery." Because the testimony could be viewed either way, it did not rise to the level of clear and convincing evidence of resistance to drug treatment.

The juvenile court also found it had not been shown by clear and convincing evidence that Mother failed to make a reasonable effort to treat her drug addiction. The court stated, "in this court's mind, there's credible evidence that mother is making this effort now." The court was "impressed" that Mother had established a plan for treating her substance abuse, including maintaining a three-month supply of medication, voluntarily entering a sober living home, having the sober living home manager make sure she stays on her medication, attending AA meetings, and having an AA sponsor. In addition, the court noted Mother was subject to drug testing and had enrolled in a perinatal program.

The court concluded Mother was not just "going through the . . . 'motions'" in order to regain custody but was making an honest effort at rehabilitation. The court identified two bases for that conclusion. First, Mother was able to accurately paraphrase the third step of the 12-step program. Second, when asked whether her rehabilitation efforts would be successful, Mother responded, "God only knows and time will tell." The court stated it would not expect that answer from someone who was not serious about recovering.

On March 4, 2009, Chloe and Christian appealed from the order granting Mother reunification services. SSA did not appeal.

On March 12, 2009, a dispositional order was entered declaring Chloe and Christian to be dependant children, vesting custody with SSA, and approving a case plan and visitation plan. A six-month review hearing was set for May 22, 2009. We construe

Chloe and Christian's appeal as being taken from the March 12 dispositional order. (Cal. Rules of Court, rule 8.104(e)(2).)

III.

DISCUSSION

A. *Mootness*

Mother argues the appeal is moot because reunification services have been provided "and cannot be rescinded."

As a general rule, appellate courts may only decide actual controversies, and "'an action which originally was based upon a justiciable controversy cannot be maintained on appeal if the questions raised therein have become moot by subsequent acts or events.'" (*In re Christina A.* (2001) 91 Cal.App.4th 1153, 1158.) Mootness in a dependency case should be decided on a case-by-case basis. (*In re Dani R.* (2001) 89 Cal.App.4th 402, 404-405.)

In *In re Pablo D.* (1998) 67 Cal.App.4th 759, 760, the minor appealed from an order at the 12-month review hearing extending reunification services to the 18-month review hearing. When the opinion was issued, the 18-month review hearing had not been held and reunification services were "ongoing." (*Id.* at p. 761.) A panel of this court concluded the appeal was moot because "we cannot rescind services that have already been received by the parents." (*Ibid.*)

It is true we cannot rescind services already received by Mother, but that does not mean we would be unable to fashion an effective remedy in this matter. The case plan and order are silent as to how long Mother is to receive reunification services. We have no evidence a six-month hearing has been held and services have been completed or terminated. If we were to reverse the order granting Mother reunification services, future services would cease, and the parties would be placed in the situation they would have been in if the juvenile court's dispositional order had denied reunification services. We conclude, therefore, the appeal is not moot. We must

respectfully decline to follow *In re Pablo D.* to the extent our conclusion is inconsistent with it.

B. *Sufficiency of the Evidence to Support the Order Offering Mother Reunification Services*

1. *Standard of Review*

We affirm an order granting or denying reunification services if substantial evidence supports the order. (*In re Harmony B.* (2005) 125 Cal.App.4th 831, 839.) "When the sufficiency of the evidence to support a juvenile court's finding or order is challenged on appeal, the reviewing court must determine if there is substantial evidence, contradicted or uncontradicted, that supports it. [Citations.] Under this standard of review we examine the whole record in a light most favorable to the findings and conclusions of the juvenile court and defer to the lower court on issues of credibility of the evidence and witnesses. [Citation.] We must resolve all conflicts in support of the determination and indulge all legitimate inferences to uphold the court's order. Additionally, we may not substitute our deductions for those of the trier of fact. [Citations.]." (*In re Albert T.* (2006) 144 Cal.App.4th 207, 216.)

2. *Exceptions Under Section 361.5, Subdivision (b)(10), (11), and (13) to Offering Reunification Services*

When a child is removed from the custody of the child's parents, reunification services must be offered to the parents unless one of several statutory exceptions applies. (§ 361.5, subd. (a).) If the juvenile court finds by clear and convincing evidence a parent comes within an exception described in subdivision (b) of section 361.5, the court need not provide reunification services. (§ 361.5, subd. (b).) The party opposing reunification services bears the burden of establishing the parent comes within one of the exceptions of section 361.5, subdivision (b). (*In re Angelique C.* (2003) 113 Cal.App.4th 509, 521.) If a parent comes within the exceptions of subdivision (b)(3), (4), or (6) through (15), then the juvenile court "shall not" offer reunification services

unless the court finds by clear and convincing evidence "that reunification is in the best interest of the child." (§ 361.5, subd. (c).)

The exceptions at issue in this case are subdivision (b)(10), (11), and (13) of section 361.5.

a. Section 361.5, Subdivision (b)(10) and (11)

The exception of subdivision (b)(10) of section 361.5 arises when "the court ordered termination of reunification services for any siblings or half siblings of the child because the parent . . . failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed . . . and that, according to the findings of the court, this parent . . . has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from that parent . . . ."

The exception of subdivision (b)(11) of section 361.5 arises when "the parental rights of a parent over any sibling or half sibling of the child had been permanently severed, and this parent is the same parent described in subdivision (a), and that, according to the findings of the court, this parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from the parent."

It is uncontested that Mother had reunification services and parental rights terminated to siblings and/or half siblings of Chloe and Christian. The juvenile court found Mother did not come within subdivision (b)(10) or (11) of section 361.5 because it had not been shown by clear and convincing evidence that she had not made a reasonable effort to treat the problems that led to the removal of the sibling or half sibling. The court's finding was based on Mother's testimony that (1) Mother had received a three-month supply of medication for bipolar and schizoaffective disorder; (2) Mother had entered a sober living home on her own volition; (3) the manager of the sober living home dispenses Mother's medications; and (4) Mother had resumed attending AA meetings and had an AA sponsor. This evidence was sufficient to support the finding.

As Chloe and Christian's counsel argues, Mother's efforts at addressing the problems were made within a month before the dispositional hearing. In that sense, Mother's efforts could be viewed as insincere and Mother was "go[ing] through the motions of rehabilitation just long enough to regain custody of . . . her child[ren]." (*Randi R. v. Superior Court* (1998) 64 Cal.App.4th 67, 731.) However, the court specifically found that Mother was making an honest effort. The court was impressed by Mother's ability to paraphrase the third step of the 12-step program and by her candidness in acknowledging "[o]nly God will tell" whether she would be successful. We must defer to the juvenile court's assessment of Mother's credibility.

b. Section 361.5, Subdivision (b)(13)

The exception of subdivision (b)(13) of section 361.5 arises when "the parent . . . of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention, *or* has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible." (Italics added.)

Mother unquestionably has had "a history of extensive, abusive, and chronic use of drugs or alcohol."[2] The juvenile court found, however, the evidence was not clear and convincing that Mother had resisted prior court-ordered treatment for her problems during a three-year period immediately prior to the filing of the petition. The court's finding is supported by substantial evidence. The court acknowledged Mother's history of sobriety and relapse and accepted as true Mother's testimony that she had been sober for a five-year period. The court declined to draw the inference that Mother had

[2] The evidence showed that Mother once might have failed or refused to comply with a program of drug or alcohol treatment described in a case plan. Thus, Mother would not come within the alternate condition of section 361.5, subdivision (b)(13).

been resistant to treatment. Instead, the court drew the reasonable inference that Mother was engaged in the "recognized pattern of relapse typical of an addict still in the midst of the war for recovery." The juvenile court also considered evidence that, since being released from jail, Mother voluntarily entered a sober living home, attended AA meetings, and had an AA sponsor.

Although Mother's efforts were recent, the juvenile court found Mother to be credible and her efforts honest. We cannot interfere with the court's credibility determinations. The evidence was sufficient to support the court's finding that clear and convincing evidence did not establish Mother came within the exception of section 361.5, subdivision (b)(13).

We emphasize our opinion addresses only the juvenile court's initial decision to offer Mother reunification services. Nothing in this opinion should be construed as a comment on the propriety or wisdom of continuing or terminating reunification services based on events occurring after the dispositional order.

IV.

DISPOSITION

The dispositional order is affirmed.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.